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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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MAR 25 2005

FILE:

WAC 03 212 53219

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

R Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Geology from Columbia University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, geology, and that the proposed benefits of his work, improved understanding of climate changes, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In evaluating this question, the director stated the following:

The petitioner has not established that there is any real urgency to his entry into the United States in an immigrant status. . . . In fact, the petitioner must show that by not being given immediate immigrant status the national interest of the United States would actually be harmed. The petitioner has failed to establish that such harm to the national interest would occur if his employer took the extra time to obtain a labor certification through the normal labor certification process.

The director then noted the petitioner's nonimmigrant status and concluded that the labor certification process could be completed prior to the expiration of that status.

The language used by the director does not reflect the proper standard set forth in *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 215. That decision does state that the national interest waiver was not intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223. This language, however, merely emphasizes that the inconvenience of the process itself is not an argument to waive the requirement. Such language does not imply that the petitioner must demonstrate that there is any "urgency" to his adjustment to lawful permanent resident status. In fact, the AAO clearly stated that the inapplicability of the labor certification process is not, in and of itself, a basis

to waive that process. *Id.* at 218, n. 5. Thus, had the petitioner demonstrated that the labor certification process would have lasted longer than his nonimmigrant status, that information would not have justified the waiver.¹ In light of the above, the director erred in making this issue the focus of his decision.²

The appropriate standard for evaluating waiver requests is set forth earlier in the AAO's precedent decision. In discussing the standard for evaluating whether the alien will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications, the AAO indicated that it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The footnote to this statement provides that the petitioner must demonstrate a past history of demonstrable achievement with some degree of influence on the field as a whole. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks.

Therefore, this matter will be remanded for consideration of the evidence under the appropriate standard. Specifically, the director should consider the petitioner's past record, not the remaining time as a nonimmigrant. The director should consider whether the published material about the petitioner's work relates to his eligibility as of the date of filing. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

¹ The director's analysis would favor aliens who file their petitions later in their stay as a nonimmigrant rather than those with superior achievements.

² The petitioner's nonimmigrant status might be relevant in situations where the petitioner's sole basis for the waiver is the proposed benefit from a single short-term project likely to be completed prior to the expiration of the alien's nonimmigrant status. Such facts are not present in this matter.